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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BARRY TUBB, an individual,

Plaintiff,

vs.

PARAMOUNT PICTURES
CORPORATION, a Delaware
corporation,

Defendant.

Case No. **2:24-cv-01417-GW-BFMx**

**NOTICE OF MOTION AND
MOTION FOR SECURITY FOR
COSTS AND FEES; SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES
[C.C.P. § 1030]**

[Declaration Of Dan Laidman
Concurrently Filed; [Proposed] Order
Concurrently Lodged]

Hearing Date: June 24, 2024
Time: 8:30 a.m.
Courtroom: 9D

Action Filed: February 21, 2024

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 24, 2024, at 8:30 a.m., or as soon
thereafter as this matter may be heard in Courtroom 9D of the above-entitled court,
located at 350 West 1st Street, Los Angeles, CA 90012, defendant Paramount

1 Pictures Corporation (“Paramount” or “Defendant”) will and hereby does move this
 2 Court, pursuant to California Code of Civil Procedure § 1030(a), and this Court’s
 3 inherent authority, for an order requiring Plaintiff Barry Tubb to post a bond of at
 4 least \$250,000 to secure the payment of Defendant’s attorneys’ fees and costs.¹

5 This Motion is made on the following grounds:

6 1. Plaintiff resides outside of California, in the state of Texas, and
 7 therefore is subject to Section 1030’s bond requirement. See Memorandum Of
 8 Points And Authorities, Section III.A.

9 2. Paramount has a reasonable possibility of prevailing in this action.
 10 See Id., Section III.B. Paramount’s defenses to Plaintiff’s claims are discussed at
 11 length in its concurrently-filed Special Motion To Strike Plaintiff’s state law claims,
 12 brought pursuant to California Code of Civil Procedure § 425.16 (“SLAPP
 13 Motion”), and Motion To Dismiss Plaintiff’s Complaint, brought pursuant to
 14 Federal Rule of Civil Procedure 12(b)(6) (“Motion to Dismiss” or “MTD”). The
 15 SLAPP Motion and MTD are incorporated by reference into this Motion.

16 3. Paramount has a reasonable possibility of obtaining a substantial
 17 attorneys’ fee award in addition to prevailing party costs. See id., Section III.C.
 18 There are three bases for Paramount’s anticipated fee award:

- 19 a. Defendants who prevail on SLAPP Motions are entitled to recover
 20 their reasonable fees and costs. See C.C.P. § 425.16(c); Section III.C.
- 21 b. Parties who prevail on claims under California’s right-of-publicity
 22 statute, California Civil Code § 3344, and any intertwined claims, are
 23 entitled to recover their reasonable fees and costs. See Cal. Civ. Code
 24 § 3344(a); Section III.C.

25
 26 ¹ The requested bond amount is based on the attorneys’ fees and costs
 27 Paramount anticipates incurring in connection with its concurrently-filed SLAPP
 28 Motion and Motion To Dismiss. Paramount reserves the right to seek a bond in a
 higher amount if the proceedings extend beyond these early dispositive motions.

c. Parties who prevail on Lanham Act claims may be awarded their reasonable attorneys' fees and costs. See 15 U.S.C. § 1117(a); Section III.C.

4. The amount of the requested bond is reasonable, given Paramount's anticipated fees and costs and the nature of this lawsuit, which directly targets Paramount's exercise of its First Amendment rights. Id., Section III.D.

5. The requested bond is reasonable to require from Plaintiff, because the Complaint establishes that he has the resources to post such an undertaking. Id., Section III.D.

This Motion is based on this Notice; on the attached Memorandum Of Points And Authorities; on the concurrently-filed SLAPP Motion and MTD, Request For Judicial Notice, Declaration of Amanda Hutchison with Exhibit A, Declaration Of Dan Laidman With Exhibits D-F, and Notice of Manuel Filing Of DVDs With Exhibits B-C; on any other matters of which this Court may take judicial notice; on all pleadings, files and records in this action; and on such argument as may be received by this Court at the hearing on this Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on April 11, 2024. See Laidman Decl. ¶ 8.

For all of the reasons stated, Paramount respectfully requests that this Court grant its Motion and require Plaintiff to post a bond of at least \$250,000 to cover some or all of the attorneys' fees and costs Paramount expects to incur in seeking the dismissal of Plaintiff's Complaint through the pending dispositive motions.

DATED: April 18, 2024

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
DAN LAIDMAN
SAM F. CATE-GUMPART

By: /s/ Dan Laidman
Dan Laidman

Attorneys for Defendant
PARAMOUNT PICTURES
CORPORATION

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

This Court has the “inherent power” to require a plaintiff to post a bond to cover the attorneys’ fees and costs incurred by a defendant in defending against the action, especially “when a non-resident party is involved.” Simulnet East Assoc. v. Ramada Hotel Operating Co., 37 F.3d 573, 574 (9th Cir. 1994) (quotation omitted). The Court can exercise that power by applying related state law provisions, including California Code of Civil Procedure § 1030, which requires a bond when the plaintiff resides out of state and there is a reasonable possibility that the defendant will obtain an award of fees or costs. E.g., Suzhou Angela Online Game Technology Co., Ltd. v. Snail Games USA Inc., 2023 WL 2465972, at *3-4 (C.D. Cal. Mar. 9, 2023) (requiring plaintiff to post bond based on court’s inherent power and Section 1030).

Those circumstances exist here. Plaintiff’s Complaint alleges that he resides in Texas, and there is far more than a reasonable possibility that Paramount will prevail in this action, and in doing so, will recover the attorneys’ fees and costs incurred in its defense. See Section III, supra. As set forth in detail in Paramount’s concurrently-filed SLAPP Motion and Motion To Dismiss, Plaintiff’s Complaint is unlikely to succeed as a matter of law for numerous reasons. Id. If Paramount prevails, it has several independent grounds for seeking recovery of fees and costs.

First, because Plaintiff’s claims arise entirely from the content of an artistic work – Paramount’s feature film “Top Gun: Maverick” (the “Film” or “Maverick”) – Plaintiff’s state law causes of action are subject to dismissal under California’s SLAPP statute, which includes a mandatory fee-shifting provision for prevailing defendants. Second, California’s right-of-publicity statute, which is the basis for one of Plaintiff’s claims, includes a mandatory fee-shifting provision for prevailing parties. See Civ. Code § 3344(a). Third, if Paramount prevails on Plaintiff’s Lanham Act claim, it also can seek reimbursement of its fees and costs under that

statute. See 15 U.S.C. § 1117(a). Although that fee provision is discretionary, courts favor fee awards to prevailing defendants in cases like this one, where a plaintiff uses the Lanham Act to target constitutionally-protected expressive works. See Section III.C, supra.

The requested bond amount is reasonable, because it directly reflects Paramount's anticipated defense costs through the adjudication of its initial dispositive motions. See Section III.D, supra. The amount requested also is reasonable to require from Plaintiff, because he alleges that he is a prominent, successful actor, and there is no basis for concern about the bond denying him access to the courts. Id.

For all of these reasons, Paramount respectfully requests that this Court grant this Motion, and require Plaintiff to post a bond of at least \$250,000.

II. STATEMENT OF FACTS

In Paramount's iconic 1986 film "Top Gun," Tom Cruise portrayed a talented, arrogant fighter pilot (nicknamed "Maverick"), participating in the Navy's elite "Top Gun" training program. Anthony Edwards' character ("Goose") was Maverick's wingman and best friend; Val Kilmer played "Iceman," Maverick's rival. During a training exercise, Maverick's plane suffers engine failure, resulting in an accident in which Goose dies; Maverick has to overcome his guilt to save Iceman's life when the trainees face actual combat. Ex. C at 1:04:00-1:09:15; 1:28:01-1:41:29.

Plaintiff is an actor who appeared in "Top Gun" as the character "Wolfman," another fighter pilot trainee, who is depicted in that film wearing a cowboy hat and silver watch. E.g., Ex. C at 26:49; 33:41-33:48. Plaintiff had a written agreement ("Agreement") to participate in the Original Film. Cmplt. ¶ 113 & Pl. Ex. A. Among other things, it provides that Paramount is "the sole and exclusive owner of all rights in the role or character portrayed by [Plaintiff], including name, likeness and distinctive characterizations thereof"; Paramount's rights include "the right to

1 merchandise and exploit such role or character, and the right to use [Plaintiff]’s
 2 name and likeness in connection therewith....” Cmplt. ¶ 117 & Ex. A at 7 ¶ A
 3 (emphasis added).

4 Plaintiff alleges that during the filming of “Top Gun,” photographer Herb
 5 Ritts took a “behind-the-scenes” picture (“Photograph”) depicting cast members
 6 (including Cruise, Edwards, Kilmer, and Plaintiff) and Navy pilots whom he says
 7 “flew in and consulted on the” film. Cmplt. ¶ 39; Pl. Ex. C. (Ritts was hired by
 8 Paramount, which owns the copyright to his photographs. See Hutchison Decl., Ex.
 9 A.) The Photograph depicts cast members wearing the flight suits their characters
 10 wore during much of the film, with some members of the group in military garb.
 11 Pl. Ex. C. Plaintiff also is wearing his character’s “signature” cowboy hat and a
 12 silver watch. Cmplt. ¶ 46; see Pl. Ex. C; Ex. D.

13 The “Maverick” Film is a sequel to Top Gun that was released in 2022. It
 14 takes place 30 years later, with Maverick now training young fighter pilots,
 15 including Goose’s son, Rooster. Ex. B. Much of the Film focuses on the fraught
 16 relationship between the two characters, as Maverick had secretly promised
 17 Rooster’s mother to stop him from becoming a fighter pilot, and Rooster is angry
 18 about Maverick’s interference. Rooster’s rival (“Hangman”) and another classmate
 19 learn about the relationship between Rooster’s father and Maverick when they see a
 20 photograph with a plaque identifying the fictional members of the 1986 Top Gun
 21 class,² with Maverick and Goose standing next to each other, and realize Goose and
 22 Rooster have the same last name. Ex. B at 44:22-44:28; Cmplt. ¶ 38.

23 The Film shows a slightly altered version of the Photograph.³ It appears for
 24 only a few seconds, starting with the depiction of the entire “Class of 1986” before
 25

26
 27 ² Ex. B at 44:22.

28 ³ Cmplt. ¶ 38. There is no allegation that any of the individuals’ images were
 altered; the version used in the Film replaced a blank background with a depiction

1 zooming in briefly on Maverick and Goose, as Hangman points them out to his
 2 classmate. Ex. B at 44:22-44:28. Wolfman is standing partly behind Maverick in
 3 the class photo. Ex. D.

4 Plaintiff filed this lawsuit on February 21, 2024. He asserts seven causes of
 5 action, all of which arise solely from the inclusion of his image in character as
 6 Wolfman in the “Class of 1986” photograph, as depicted briefly in that one scene in
 7 the Film. Cmplt. ¶¶ 61-126.

8 **III. THIS COURT SHOULD REQUIRE PLAINTIFF TO POST** 9 **SECURITY FOR DEFENDANT’S COSTS AND FEES**

10 Federal district courts have the inherent power to require plaintiffs to post a
 11 bond to cover a defendant’s anticipated recoverable fees and costs. See Simulnet,
 12 37 F.3d at 574; In re Merrill Lynch Relocation Mgmt, Inc., 812 F.2d 1116, 1121
 13 (9th Cir. 1987) (recognizing court’s authority to require nonresident plaintiff to post
 14 a bond to cover defendant’s costs). “The power to tax costs implies ancillary power
 15 to take reasonable measures to ensure that costs will be paid.” Anderson v. Steers,
 16 Sullivan, McNamar & Rogers, 998 F.2d 495, 496 (7th Cir. 1993).

17 “Typically federal courts, either by rule or by case-to-case determination,
 18 follow the forum state’s practice with regard to security for costs [T]his is
 19 especially common when a non-resident party is involved.” Simulnet, 37 F.3d at
 20 574. California law on this subject is clear: courts expressly are authorized to
 21 require a plaintiff who “resides out of state ... to file an undertaking to secure an
 22 award of costs and attorney’s fees which may be awarded in the action or special
 23 proceeding.” Cal. Code of Civ. Proc. § 1030(a). In Simulnet, the Ninth Circuit
 24 recognized that the Nevada District Court could rely on a Nevada statute that is
 25 materially identical to C.C.P. § 1030(a). 37 F.3d at 574. Although federal courts
 26 are not “bound to follow the state procedural law in all respects,” they nonetheless

27
 28 of a fighter jet in front of a building emblazoned with the words “TOP GUN.”
Compare Pl. Ex. C with Ex. B at 44:22.

1 look to Section 1030 for guidance in determining whether the plaintiff should be
2 required to post a bond. Suzhou Angela, 2023 WL 2465972, at *3.

3 Under this Circuit’s law, federal courts applying Section 1030 will require an
4 out-of-state plaintiff to post a bond based on: “(i) the degree of probability/
5 improbability of success on the merits, and the background and purpose of the suit;
6 (ii) the reasonable extent of the security to be posted, if any, viewed from the
7 defendant’s perspective; and (iii) the reasonable extent of the security to be posted,
8 if any, viewed from the nondomiciliary plaintiff’s perspective.” Simulnet, 37 F.3d
9 at 576. All of these factors favor requiring Plaintiff to post a bond here.

10 **A. Plaintiff Is An Out-Of-State Resident.**

11 It is undisputed that Plaintiff is not a California resident; he alleges that he
12 resides in Texas. See Cmpl. ¶¶ 18, 23. This satisfies the threshold requirement for
13 a bond under Section 1030. See C.C.P. § 1030.

14 **B. There Is A Reasonable Possibility Paramount Will Prevail.**

15 To obtain a bond, a defendant need not show “that there [is] no possibility
16 that [plaintiff] could win at trial, but only that it [is] reasonably possible that
17 [defendant] would win.” Baltayan v. Estate of Getemyan, 90 Cal. App. 4th 1427,
18 1432 (2001) (original emphasis). Under California’s Section 1030, “the ‘reasonable
19 possibility’ standard is relatively low.” Suzhou Angela, 2023 WL 2465972, at *4
20 (quoting Wilson & Haubert, PLLC v. Yahoo! Inc., 2014 WL 1351210, at *3 (N.D.
21 Cal. Apr. 4, 2014)). Another district court explained, “[t]his hurdle is a relatively
22 low one . . . the Ninth Circuit has held that district courts do not abuse their
23 discretion by requiring a security when it would not be illogical, implausible, or
24 without support in the record to conclude that there [is] a reasonable possibility that
25 [the defendant] would prevail and be entitled to fees and costs . . .” Crytech GmbH
26 v. Cloud Imperium Games Corp., 2019 WL 4149337, at *2 (C.D. Cal. July 22,
27 2019).
28

1 In Gabriel Technologies Corp. v. Qualcomm Inc., 2010 U.S. Dist. LEXIS
 2 98229, at *16 (S.D. Cal. Sept. 20, 2010), the court rejected the plaintiff's contention
 3 that the defendants had to "substantially refute" each claim, concluding that the
 4 plain language of Section 1030 imposed the looser "reasonable possibility"
 5 standard. Id. at *14-15. Nor are defendants seeking a bond required to demonstrate
 6 that the plaintiff is a vexatious litigant, or that the plaintiff's claims are frivolous.
 7 Id. at *17 n.5.

8 For the reasons set forth in more detail in Paramount's concurrently-filed
 9 SLAPP Motion and Motion To Dismiss, it has more than a reasonable possibility of
 10 prevailing in this action.

11 First, because Plaintiff's Lanham Act claim arises solely from the content of
 12 a constitutionally-protected expressive work, it is subject to dismissal under the
 13 First Amendment-based test identified in Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.
 14 1989), which the Ninth Circuit has adopted as a threshold for Lanham Act claims
 15 based on the content of films and other expressive works. E.g., Brown v. Electronic
 16 Arts, Inc., 724 F.3d 1235, 1239 (9th Cir. 2013). As set forth in detail in
 17 Paramount's Motion To Dismiss, where, as here, the "use" at issue is artistically
 18 relevant and not explicitly misleading, the First Amendment bars liability under the
 19 Lanham Act. See MTD, Section III.A.1⁴

20 Second, Plaintiff's state law right-of-publicity claims also are barred by the
 21 First Amendment, because the alleged use of Plaintiff's image was in an expressive
 22 work, in a transformative manner. See SLAPP Motion, Section IV.A.1-2; MTD,
 23 Section III.B.1-2. Plaintiff's right-of-publicity claims also are preempted by federal
 24 copyright law because the Film only uses his image as embodied in a copyrightable
 25 photograph. See SLAPP Motion, Section IV.A.3; MTD, Section III.B.3.

27 ⁴ Plaintiff's Lanham Act claim independently fails under basic statutory
 28 principles, because given the context, there is no likelihood of consumer confusion
 as a matter of law in any event. Id., Section III.A.2.

1 Paramount also had a contractual right to use Plaintiff's image as the Wolfman
 2 character. See SLAPP Motion, Section IV.A.4; MTD, Section III.B.4. Plaintiff's
 3 statutory claim under Section 3344 also fails because the use at issue was not a
 4 commercial use of the type that can give rise to right-of-publicity liability, and the
 5 use falls within the statute's exemption for group photographs. See SLAPP Motion,
 6 Section IV.A.5; MTD, Section III.B.5.

7 Third, Plaintiff's tack-on negligence claim is derivative of his right-of-
 8 publicity claims, and is barred for the same reasons as those claims. See SLAPP
 9 Motion, Section III.B; MTD, Section IV.C. Plaintiff also fails to plead any legally-
 10 cognizable duty owed to him by Paramount. Id.

11 Fourth, Plaintiff's breach of contract claim fails because the contract does not
 12 prohibit Paramount from using his image in the challenged manner; to the contrary,
 13 it expressly authorizes this kind of use. See SLAPP Motion, Section IV.C; MTD,
 14 Section III.D.

15 Fifth, Plaintiff's First Cause of Action for declaratory relief fails because it is
 16 derivative of Plaintiff's other claims, and fails for the same reasons as those claims.
 17 See MTD, Section III.E.

18 Finally, Plaintiff's claim for injunctive relief does not state a separate cause
 19 of action; it also would constitute an unconstitutional prior restraint, which the First
 20 Amendment prohibits. See SLAPP Motion, Section IV.D; MTD, Section III.F.

21 For all of these reasons, as described in detail in Paramount's concurrently-
 22 filed dispositive motions, there is far more than the requisite reasonable possibility
 23 that it will prevail on the merits in this action.

24 **C. There Is A Reasonable Possibility Paramount Will Recover Substantial**
 25 **Attorneys' Fees And Costs In This Action.**

26 In addition to the litigation costs awarded to any prevailing party, Paramount
 27 has a strong possibility of recovering a significant attorneys' fees award from
 28 Plaintiff in this case.

1 First, Paramount has moved to strike Plaintiff's state law claims under
 2 California's SLAPP statute, which includes a mandatory fee-shifting provision for a
 3 prevailing defendant. California Code of Civil Procedure § 425.16(c) provides that
 4 "a prevailing defendant on a special motion to strike shall be entitled to recover [its]
 5 attorneys' fees and costs." The California Supreme Court has emphasized that
 6 "[a]ny SLAPP defendant who brings a successful motion to strike is entitled to
 7 mandatory attorney fees." Ketchum v. Moses, 24 Cal.4th 1122, 1131 (2001)
 8 (emphasis added). This applies even where, as here, the plaintiff is an individual
 9 and the prevailing defendant is a business. See Braun v. Chronicle Publ'g Co., 52
 10 Cal. App. 4th 1036, 1052-53 (1997) (rejecting individual plaintiff's argument that
 11 she should not have to reimburse the defendant's fees under Section 425.16(c)
 12 because it was "a media defendant," explaining that "the statute clearly is to the
 13 contrary"); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003)
 14 (SLAPP statute applied and required fee-shifting even though plaintiff argued he
 15 was "a 'little guy' seeking to vindicate his rights under California's consumer
 16 protection statutes").

17 The Ninth Circuit has held unequivocally that Section 425.16(c)'s mandatory
 18 fee-shifting provision applies in federal court. See, e.g., Thomas v. Fry's
 19 Electronics, Inc., 400 F.3d 1206, 1209 (9th Cir. 2005) ("California anti-SLAPP
 20 motions to strike and entitlement to fees and costs are available to litigants
 21 proceeding in federal court"), citing United States ex rel. Newsham v. Lockheed
 22 Missiles & Space Co., 190 F.3d 963, 971-973 (9th Cir. 1999)); Manufactured Home
 23 Communities, Inc. v. County of San Diego, 655 F.3d 1171, 1181 (9th Cir. 2011)
 24 (affirming award of attorneys' fees to prevailing defendants on SLAPP motion).⁵

25
 26
 27 ⁵ See also Ray Charles Found. v. Robinson, 919 F. Supp. 2d 1054, 1067
 28 (C.D. Cal. 2013), rev'd on other grounds, 795 F.3d 1109 (9th Cir. 2015) ("[b]ecause
 Defendants have prevailed on their anti-SLAPP motion, attorney's fees are
 mandatory and the Court awards them"); New.Net, Inc. v. Lavasoft, 356 F. Supp.

Moreover, it is well established in the context of special motions to strike under Section 425.16 that a defendant is considered a prevailing party entitled to attorneys' fees and costs even if the Court strikes only some of the plaintiff's causes of action. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1020 (2001) ("defendants in this case should be considered prevailing parties, and therefore should recover attorney fees and costs, notwithstanding their partial success on their SLAPP motion"). Consequently, Paramount will be considered a prevailing party, and will be entitled to fees, if it succeeds in having any of Plaintiff's claims dismissed under the SLAPP statute. See Mireskandari v. Associated Newspapers, Ltd., 665 Fed. App'x 570, 572 (9th Cir. 2016) (affirming fee award under Section 425.16 where defendant "did not prevail on the whole of its anti-SLAPP motion"); Scott v. Kelkris Associates, Inc., 2012 WL 1131360, at *4 (E.D. Cal. Mar. 29, 2012) (awarding fees to defendant under Section 425.16(c) after SLAPP motion eliminated some, but not all, of the plaintiff's claims).

Second, Paramount independently is entitled to recover its fees and costs if it prevails on Plaintiff's statutory right-of-publicity claim. Cal. Civ. Code § 3344(a). As the Ninth Circuit has held, "section 3344 clearly mandates an award of attorney's fees" to the prevailing party in any case arising under California's right-of-publicity statute. Love v. Associated Newspapers, Ltd., 611 F.3d 601, 614 (9th Cir. 2010); see also Lewis v. Activision Blizzard, Inc., 2014 U.S. Dist. LEXIS 135889, *4-5 (N.D. Cal. Sept. 25, 2014) ("where a plaintiff brings a claim under section 3344 and, as here, that claim fails as a matter of law, the defendant has prevailed on that claim and is entitled to recover attorneys' fees"). "[S]ection 2d 1090, 1115 (C.D. Cal. 2004) ("defendant who prevails on an anti-SLAPP motion to strike is entitled to recover his or her attorney fees"); eCash Techs., Inc. v. Guagliardo, 210 F. Supp. 2d 1138, 1183-84 (C.D. Cal. 2000) ("[t]he attorneys' fees provision of Section 425.16 also applies in federal court, and declares that an award of attorneys' fees to a moving party is mandatory if a special motion to strike is granted"); Maloney v. T3Media, Inc., 2015 WL 3879634, at *10 (C.D. Cal. May 27, 2015) (awarding fees to prevailing SLAPP defendant).

1 3344's directive that fees 'shall' be awarded to the prevailing party in a statutory
 2 appropriation action is clearly mandatory," and "leaves no room for ambiguity."
 3 Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 62 (2006). See also Maloney,
 4 2015 WL 3879634, at *10 (awarding defendant fees under Section 3344 as well as
 5 the SLAPP statute).

6 Moreover, where, as here, the defenses to the statutory misappropriation
 7 claim are "intertwined" with fees and costs incurred in defending against other
 8 claims, the prevailing defendant may recover fees incurred in defending against all
 9 of the intertwined claims. E.g., Love v. The Mail on Sunday, 2007 U.S. Dist.
 10 LEXIS 97061, *9-10, *35-38 (C.D. Cal. Sept. 7, 2007), aff'd sub nom. Love v.
 11 Associated Newspapers, Ltd., 611 F.3d 601 (9th Cir. 2010) (awarding \$518,859 in
 12 attorneys' fees after defendant successfully defeated plaintiff's statutory and
 13 common-law right-of-publicity claims and related claims); Kirby, 144 Cal. App.
 14 4th at 62 n.7 (same; affirming award to prevailing defendants of \$618,000 in
 15 attorneys' fees for trial-court work on right-of-publicity and related claims).
 16 Consequently, Paramount will be entitled to recover fees under Section 3344 for
 17 intertwined work on Plaintiff's claims that are derivative of his misappropriation
 18 claims, including his claims for negligence and declaratory injunctive relief. See
 19 SLAPP Motion at Section IV.B; MTD at Sections III.C, III.E.

20 Third, Paramount can be awarded its fees for successfully defending against
 21 Plaintiff's Lanham Act claim. Section 35(a) of the Lanham Act provides that the
 22 court "in exceptional cases may award reasonable attorney fees to the prevailing
 23 party." 15 U.S.C. § 1117(a). The Ninth Circuit has explained that "an 'exceptional'
 24 case is simply one that stands out from others with respect to the substantive
 25 strength of a party's litigating position (considering both the governing law and the
 26 facts of the case) or the unreasonable manner in which the case was litigated."
 27 SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd., 839 F.3d 1179, 1180 (9th Cir.
 28

2016) (en banc) (quoting Octane Fitness, LLC v. ICON Health & Fitness, 572 U.S. 545, 554 (2014)).

This standard is easily met here, given that Plaintiff’s Lanham Act claim is based solely on the content of an expressive work, and therefore is clearly barred by under well-established First Amendment law. See Section III.B, supra; MTD at Section III.A. The Ninth Circuit has identified such cases as ones in which it is appropriate for the defendant to recover its fees under the Lanham Act. See Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 816 (9th Cir. 2003) (fee-shifting proper where the defendant’s use “was protected by policy interests in free expression”); Mattel, Inc. v. Walking Mountain Productions, 2004 WL 1454100, at *3-4 (C.D. Cal. June 21, 2004) (awarding prevailing defendant more than \$1.8 million in fees and costs under Lanham Act and Copyright Act on remand from Ninth Circuit); Tobinick v. Novella, 2017 WL 8809365, at *3, 8 (S.D. Fla. Nov. 29, 2017) (awarding prevailing defendants fees under the Lanham Act where plaintiff unreasonably pursued trademark claim targeting non-commercial speech).

For all of these reasons, Paramount has more than a reasonable possibility both of prevailing and recovering its fees and costs from Plaintiff.

D. The Requested Bond Is Reasonable Under The Circumstances.

In deciding whether to require a bond, federal district courts also consider “the reasonable extent of the security to be posted, if any, viewed from the defendant’s perspective,” and “the reasonable extent of the security to be posted, if any, viewed from the nondomiciliary plaintiff’s perspective.” Simulnet, 37 F.3d at 576 (quotation omitted). Paramount’s request for a bond of at least \$250,000 is reasonable and appropriate under the circumstances of the case.

First, the amount sought for the bond here is based on Paramount’s anticipated attorneys’ fees and costs in connection with its pending SLAPP Motion

1 and Motion to Dismiss. See Laidman Decl. ¶ 7.⁶ The requested amount reflects the
 2 likely defense costs for obtaining the dismissal of Plaintiff's seven causes of action,
 3 and it is consistent with fee awards in comparable cases. Id.⁷ The requested bond
 4 amount therefore is appropriate to protect Paramount's right to recover the fees and
 5 costs that it expects to incur in this action.

6 The bond request is especially reasonable given "the background and purpose
 7 of the suit." Simulnet, 37 F.3d at 576. Plaintiff's lawsuit squarely targets
 8 Paramount's constitutionally protected speech, as it arises solely from the content of
 9 the Film. See Cmplt. ¶ 38. Although Plaintiff tries to frame this as a contractual
 10 dispute (at least in one of his many causes of action), it is no such thing. He did not
 11 perform any services in connection with the Film, and there is no issue about
 12 compensation. No matter how they are labeled, all of Plaintiff's claims arise
 13 entirely from Paramount's use of a photograph (taken by a photographer whom
 14 Paramount had commissioned under a work-for-hire arrangement) in one brief
 15

16
 17 ⁶ Paramount reserves the right to seek a bond in a higher amount if the
 18 proceedings expand beyond the dispositive motion practice in the district court.

19 ⁷ E.g., Herring Networks, Inc. v. Maddow, 2021 WL 409724, at *11 (S.D.
 20 Cal. Feb. 5, 2021) (awarding prevailing SLAPP defendants \$247,667.50 in fees and
 21 \$10,724.36 in costs); Wynn v. Chanos, 2015 WL 3832561, at *6 (N.D. Cal. June
 22 19, 2015) (awarding \$390,149.63 in attorneys' fees in SLAPP case); Makaeff v.
 23 Trump Univ., 2015 WL 1579000, at *28 (S.D. Cal. April 9, 2015) (\$790,083.40 in
 24 fees and \$8,695.81 in costs in SLAPP case); Resolute Forest Products, Inc. v.
 25 Greenpeace Int'l, 2019 WL 8377690 (N.D. Cal. Sept. 24, 2019); N.D. Cal. Case
 26 No. 17-cv-02824-JST, Dkt. # 314 (Apr. 22, 2020 Order) (awarding Greenpeace
 27 \$545,572.36 in fees and \$20,687.18 in costs under SLAPP statute); Clifford v.
 28 Trump, 2018 U.S. Dist. LEXIS 211297, at *17 (C.D. Cal. Dec. 11, 2018) (awarding
 \$292,052.33 in SLAPP case); Open Source Sec. v. Perens, 2018 WL 2762637, at *7
 (N.D. Cal. June 9, 2018) (awarding \$259,900.50 in SLAPP case); Maloney v.
T3Media, Inc., 2015 U.S. Dist. LEXIS 86183, at *26 (C.D. Cal. May 27, 2015)
 (awarding \$195,838.50 in fees in SLAPP and Section 3344 case); Abbywho, Inc. v.
Interscope Records, 2008 WL 11406047, at *6 (C.D. Cal. Mar. 17, 2008) (awarding
 \$187,305 to defendant under Lanham Act more than 16 years ago).

1 scene in the Film, for a clear expressive purpose. Id. ¶¶ 38-39; SLAPP Motion at
 2 Section IV.A.3; Hutchison Decl, Ex. A; Ex. B (Film at 44:33-44:55).⁸

3 The Ninth Circuit has emphasized the threat that such lawsuits pose to First
 4 Amendment rights. E.g., Brown, 724 F.3d at 1242 (court applies the Rogers test to
 5 Lanham Act false endorsement claims arising from content of artistic works
 6 because “enforcing § 43(a) in this context might constrain free expression in
 7 violation of the First Amendment”); Mattel, 353 F.3d at 807 (holding Lanham Act
 8 claim based on protected speech should be dismissed, “[r]ecognizing that First
 9 Amendment concerns in free expression are particularly present in the realm of
 10 artistic works”). As the California Supreme Court observed in a right-of-publicity
 11 case arising from the depiction of the plaintiffs in an artistic work, “unnecessarily
 12 protracted litigation would have a chilling effect upon the exercise of First
 13 Amendment rights.” Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003) (quotation
 14 omitted).

15 The California Legislature also acknowledged the danger of lawsuits
 16 targeting protected speech, which “seek to deplete the defendant’s energy and drain
 17 his or her resources”; it enacted the SLAPP statute to end such actions “early and
 18 without great cost to the SLAPP target.” Varian Medical Systems, Inc. v. Delfino,
 19 35 Cal. 4th 180, 192 (2005) (quotations omitted). Therefore, the purpose of the
 20 SLAPP statute’s fee-shifting provision is “compensating the prevailing defendant
 21

22 ⁸ As discussed in the SLAPP Motion, Plaintiff alleges that the Photograph
 23 used in the Film was taken by photographer Herb Ritts (Cmplt. ¶ 39); Paramount
 24 had a work-for-hire agreement with Ritts, which gives Paramount the rights to the
 25 on-set photographs Ritts took in connection with the Original Film. See SLAPP
 26 Motion at Section IV.A.3, note 13; Hutchison Decl., Ex. A. Paramount need not
 27 prove the identity of the copyright owner for its copyright preemption defense. See
 28 id.; Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146, 1154 (9th Cir.
 2010). But the ownership of the photo further shows that Plaintiff’s lawsuit directly
 targets the content of Paramount’s speech, including its creative choices in using its
 own copyrighted materials.

1 for the undue burden of defending against litigation designed to chill the exercise of
 2 free speech and petition rights.” Barry v. State Bar of California, 2 Cal.5th 318, 328
 3 (2017). As in any SLAPP case, Plaintiff’s lawsuit burdens Defendant’s speech
 4 rights, both because of the time, energy, and cost needed for the defense, and by
 5 raising the specter of liability. Here, Plaintiff has gone even further, including a
 6 claim for injunctive relief where he expressly seeks to block the distribution of the
 7 Film. See Cmpl. ¶ 126. A “takedown order of a film of substantial interest to the
 8 public is a classic prior restraint of speech,” and “[p]rior restraints pose the most
 9 serious and the least tolerable infringement on First Amendment rights.” Garcia v.
 10 Google, Inc. 786 F.3d 733, 747 (9th Cir. 2015) (quotation omitted).

11 Given the important First Amendment interests at stake, the nature of the
 12 lawsuit, and the anticipated defense costs, the requested bond is reasonable from
 13 Paramount’s perspective.

14 Second, the amount of the requested bond also is reasonable from Plaintiff’s
 15 perspective. See Simulnet, 37 F.3d at 576. This factor is meant to ensure that
 16 courts “avoid limitation of access to the courts because of a party’s impecunious
 17 circumstance.” Id. There is no concern about that here, as Plaintiff’s own
 18 Complaint makes clear. He alleges that he is “a well-known professional actor,
 19 director, and entertainer who has earned his livelihood in the entertainment industry
 20 over the past 40 years,” and who “continues to write, perform, and direct” to this
 21 day, with an “upcoming film” coming out this year. Cmpl. ¶¶ 24, 30. Plaintiff
 22 alleges that he has appeared in “over 70 movies, television shows, commercials, and
 23 Broadway performances,” and he lists many prominent credits. Id. ¶¶ 25-29.
 24 Because Plaintiff is, by his own pleading, a successful and “internationally known”
 25 celebrity (id. ¶ 46), he is not the kind of party who might be denied access to the
 26 courts if required to post an undertaking. The requested bond therefore is
 27 reasonable from Plaintiff’s perspective as well. See Simulnet, 37 F.3d at 576.
 28

IV. CONCLUSION

Where, as here, an out-of-state resident pursues litigation against a California defendant, the law provides a mechanism for the defendant to ensure that it can recover the anticipated fees and costs it could recover if it ultimately prevails. Plaintiff resides out of state; Paramount has far more than a reasonable possibility of prevailing and recovering its attorneys' fees and costs; and the requested bond is reasonable in light of the circumstances, particularly the serious First Amendment issues at stake. For all of the foregoing reasons, Paramount respectfully requests that this Court require Plaintiff to post a bond of at least \$250,000.

DATED: April 18, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for defendant Paramount Pictures Corporation, certifies that this brief contains 4,805 words, which complies with the word limit of L.R. 11-6.1.

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